

DATE: March 4, 1997
CASE NO.: 95-INA-159

In the Matter of:

ZENITH LABORATORIES, INC.,
Employer

On Behalf Of:

EDWIN RAJ,
Alien

Appearance: H. Taufiq Choudhury, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under

prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 16, 1992, Zenith Laboratories, Inc. ("Employer") filed an application for labor certification to enable Edwin Raj ("Alien") to fill the position of Plant Engineer (AF 16). The job duties for the position are:

Supervise and direct the maintenance department. Establish and monitor preventive maintenance program. Establish maintenance work order systems. Plan and implement assigned design and construction projects. Obtain necessary government permits. Supervise disposal of solid and liquid waste. Perform engineering evaluation of production equipment purchases. Supervise preparation and implementation of departmental budget. Prepare Equipment Qualification Report for submission to FDA.

The requirements for the position are a Master of Science Degree in Mechanical Engineering. Other Special Requirements are: must be able to use AUTOCAD, Preventive Maintenance Software Package, Lotus/Symphony and WordPerfect.²

The CO issued a Notice of Findings on April 19, 1994 (AF 96), proposing to deny certification on the grounds that the Employer appears to require experience in the special requirements which appear excessive and restrictive, and while the requirement of an MS Degree is not *per se* restrictive, the Employer must document that an experienced plant manager with a BS Degree is unable to do the job pursuant to 20 C.F.R. § 656.21(b)(2). The CO also found that the Employer failed to provide the local office with a written report of its post-application recruitment efforts in violation of 20 C.F.R. § 656.21(j). In addition, the CO found that U.S. applicants Mariak, Gabriele, Munteanu, Patel, Ulisse, and Maddi were rejected for other than lawful, job-related reasons in violation of 20 C.F.R. §§ 656.24(b)(2)(ii), 656.21(b)(6), and 656.20(c)(8).

In its rebuttal, dated May 31, 1994 (AF 131), the Employer contended that its listed requirements are reasonable and necessary for the position. The Employer additionally contended that all U.S. applicants were rejected for lawful, job-related reasons; most for failing to have experience with preventative maintenance software. The Employer provided letters

¹ All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

² The Employer initially required one year of experience or one year of related experience in a Mechanical Engineering Masters program faculty position, but amended its requirements.

from a third party supporting the degree requirement and software needs. The Employer also contended that all applicants were contacted in good faith, and provided a receipt from Federal Express showing that letters were sent to the applicants in question.

The CO issued the Final Determination on June 7, 1994 (AF 136), denying certification because the Employer failed to adequately document the business necessity for the Special Requirements in violation of 20 C.F.R. § 656.21(b)(2). The CO also found that the Employer did not rebut the violation of 20 C.F.R. § 656.21(j), failing to provide the local office with a detailed report of its post-recruitment efforts. In addition, the CO found that the Employer had sufficiently documented the rejection of U.S. applicant Maddi, but had not lawfully rejected U.S. applicants Mariak, Gabriele, Munteanu, Patel, and Ulisse in violation of 20 C.F.R. §§ 656.24(b)(2)(ii), and 656.21(b)(6) (now recodified as § 656.21(b)(5)). The CO additionally found that the Employer did not adequately document its good-faith efforts to recruit U.S. applicants Munteanu, Patel, and Ulisse, in violation of 20 C.F.R. § 656.20(c)(8).

On July 12, 1994, the Employer requested review of the denial of labor certification (AF 151). The CO denied reconsideration and on August 30, 1994, forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”).

Discussion

An employer must provide the local employment service office with a written report of the results of all the employer’s post-filing recruitment efforts during the 30-day recruitment period. The recruitment report must:

- (1) identify each recruitment source by name;
- (2) state the number of U.S. workers responding to the recruitment;
- (3) state the names and addresses, and provide the resumes (if any) of the U.S. workers interviewed for the job opportunity, and state the job title of the person who interviewed each worker; and,
- (4) explain, with specificity, the lawful job-related reason for not hiring each U.S. worker interviewed.

20 C.F.R. § 656.21(j)(1)(i-iv).

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant’s qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

In this case, the Employer did not specifically address the issue of failing to provide a post-recruitment written report pursuant to 20 C.F.R. § 656.21(j)(1)(i-iv). Section 656.25(e) provides that the employer’s rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. On this basis the Board has repeatedly held

that a CO's finding which is not addressed in rebuttal is deemed admitted. *Belha Corp.*, 88-INA-24 (May 5, 1989) (*en banc*); *Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989); *Salvation Army*, 90-INA-434 (Dec. 17, 1991). Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 92-INA-321 (Aug. 4, 1993); *Korean Manpower Development, Inc.*, 93-INA-121 (Mar. 21, 1994); *Prace Fabrication Corp.*, 93-INA-179 (Mar. 28, 1994). While the Employer does assert reasons for rejecting U.S. applicants in rebuttal, it does not identify the recruitment source, or identify and state the job title of the person who interviewed each worker. Certification is properly denied on this issue alone.

The CO accepted the Employer's requirement of a Masters Degree and no experience, but found the requirement of experience in the Special Requirements of specific software knowledge restrictive and excessive. The Employer was notified that it must provide certain specific information to establish the business necessity of the software requirements in the NOF (AF 94). In rebuttal, the Employer provided a letter from the Employer's Director of Compliance which states the relevance of the software package, but also conceded that these requirements were not a normal part of a Masters Degree requirement, and were in addition to them. It stated that the Employer cannot list prior persons in the position and their skills because the position is new and there is currently no employee who is facile in the use of the preventative maintenance software package. While the specific software knowledge may bear a reasonable relationship to the Employer's business, the Employer has not shown that is essential to performing the job duties. See *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). We agree with the CO that the Employer has not adequately documented the business necessity of the Special Requirements, and that they are unduly restrictive, especially in light of the fact that they are not contained in DOT definition of plant manger, and that most U.S. applicants were rejected for not possessing this knowledge. Certification is properly denied on this issue as well.

We have found that the Employer has not established the business necessity of the Special Requirements. Therefore, the rejection of U.S. applicants Mariak, Gabriele, Munteanu, Patel, and Ulisse for failure to possess experience in the particular software contained in the Special Requirements is an unlawful rejection. Certification is also properly denied on this issue.

As we have found that labor certification has been properly denied on these issues, the other issues of the case are rendered moot.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the ____ day of March, 1997, for the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.